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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 554.

J. DAVID BROUGHTON,
Appellant,
vs.
THE STATE OF OHIO,
Appellee.

BRIEF OF OHIO CIVIL LIBERTIES UNION AS AMICUS CURIAE

In Support of Jurisdictional Statement.

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TABLE OF CONTENTS.

Statement of Interest 1

Statute Involved 2

Statement of Case 3

Argument 3

A. Ohio Revised Code Section 3773.24 Is a Law Respecting an Establishment of Religion and, Therefore, Violates the Fourteenth Amendment of the United States Constitution as it Incorporates the First Amendment 3

B. Ohio Revised Code Section 3773.24 Violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States 6

C. Ohio Revised Code Section 3773.24 Cannot Be Deemed Constitutional as a Statute Establishing a Common Day of Rest 7

(1) Common Day of Rest Statutes Are Unconstitutional 7

(2) The Statute Involved Is Not a Common Day of Rest Statute 11

(3) Sunday Cannot Constitutionally Be Selected as a Common Day of Rest 12

Conclusion 14

TABLE OF AUTHORITIES.

Cases.

Bargaintown, U. S. A., Inc. v. Whitman, October Term 1960, Docket No. 89 14

Bush v. Orleans Parish School Board, ... F. Supp. ... (Nov. 30, 1960), motion for stay denied ... U. S. ... (1960) 12

Cincinnati v. Correll, 141 Ohio St. 535 (1943) 5, 7

Frank v. Maryland, 359 U. S. 360 (1954) 9

Gallagher v. Crown Kosher Market, October Term 1960, Docket No. 11 14

Gomillion v. Lightfoot, U. S. Supreme Court, November 14, 1960 11

McCollum v. Board of Education, 333 U. S. 203 (1948) 5

McGowan v. Daryland, October Term 1960, Docket No. 8 14

Olds v. Klotz, 131 Ohio St. 447 (1936) 5

Shelton v. Tucker, U. S. Supreme Court Docket No. 14 11

State v. Kidd, 167 Ohio St. 521 (1958) 5

Two Guys From Harrison-Allentown, Inc. v. McGinley, October Term 1960, Docket No. 36 14

U. S. v. Darby Lumber Co., 312 U. S. 100 (1941) 8

Wolf v. Colorado, 338 U. S. 25 (1949) 9

Constitution.

Constitution of the United States:

First Amendment 3, 4, 14

Fourteenth Amendment 3, 6, 8, 14

Statutes.

Fair Labor Standards Act, 52 Stat. 1060 as amended, 29 U. S. C. Sections 201-219 (1938) 8

Ohio Revised Code, Sec. 3773.24 ..... 1, 2, 3, 6, 7, 14

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STATEMENT OF INTEREST.

This Amicus Curiae brief is submitted by the Ohio Civil Liberties Union, which has secured the permission of the parties for its presentation.

The Ohio Civil Liberties Union is an affiliate of the American Civil Liberties Union, a non-profit, non-partisan organization dedicated to the defense and advancement of the liberties guaranteed by the Constitution of the United States and particularly by the amendments thereto constituting the Bill of Rights.

It is the position of Amicus Curiae, in support of the Appellant herein, that the statute which is the subject of this action, Ohio Revised Code Section 3773.24, seriously violates and infringes some of the most basic rights guaranteed by the United States Constitution, rights commonly classified under the category of freedom of religion and

also those covered by the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

Accordingly, the Ohio Civil Liberties Union, recognizing compelling reasons for its appearance in this case, submits this brief, attempting to avoid repetition of arguments made in the Jurisdictional Statement of Appellant.

STATUTE INVOLVED.

Ohio's so-called "Sunday Closing Law," being Ohio Revised Code Section 3773.24 as amended, is set out in full below:

> "No person, firm, or corporation shall engage in common labor or suffer or permit a building or place to be open for transaction of business, or require a person in his employ or under his control to engage in common labor or to open a building or place for the transaction of business on Sunday. In prosecutions under this Section complaints shall be made within ten days after a violation.
>
> "This section does not apply to work of necessity or charity, and does not extend to persons who conscientiously observe the seventh day of the week as the sabbath, and abstain thereon from doing things prohibited on Sunday.
>
> "This section shall not apply to:
>
> (A) Traveling or the providing of services and commodities incidental thereto;
>
> (B) Recreation, sports, amusements, entertainment, or exhibitions or the providing of services and commodities incidental thereto;
>
> (C) Fairs held under the authority of the state or a political subdivision, or independent fairs, or the providing of services and commodities incidental thereto;

(D) The operation of publicly owned places of entertainment, recreation, or education, by a public officer, concessionaire, exhibitor, or employees of all or any of them, or any other person, or the providing of services and commodities incidental thereto."

STATEMENT OF CASE.

The facts, more fully set forth in the Jurisdictional Statement of Appellant, are as follows: J. David Broughton, Appellant herein, was charged and convicted in a municipal court within the State of Ohio of violating Ohio Revised Code Section 3773.24 in that he caused a place of business to be open on Sunday, July 26, 1959. The conviction was affirmed in the Court of Appeals and motion to certify was overruled in the Ohio Supreme Court. The effect of these rulings was to uphold the statute against Appellant's contention that it is repugnant to and violative of provisions of the First and Fourteenth Amendments to the Constitution of the United States.

ARGUMENT.

A. Ohio Revised Code Section 3773.24 is a Law Respecting an Establishment of Religion and, Therefore, Violates the Fourteenth Amendment of the United States Constitution as it Incorporates the First Amendment.

The religious basis of the Ohio Sunday Closing Law is very prominently avowed within the statute itself. The second paragraph of the enactment states that it shall not apply "* * * to persons who conscientiously observe the seventh day of the week as the sabbath, and abstain thereon from doing things prohibited on Sunday."

It has been frequently and accurately noted, as Appellant's Jurisdictional Statement sharply demonstrates, that Sunday Closing Laws and particularly the Ohio stat-

ute on the subject are enactments respecting an establishment of religion. More specifically the Christian religion is aided, preferred and protected by legislation which sharply limits activity on the holy day or day of worship of Christianity.

It is submitted that the quoted passage from the statute, perhaps designed to lessen the constitutionally offensive nature of the legislation, instead intensifies and increases the objectionable characteristics of the act. By this passage, additional religious groups, Hebrews and Seventh Day Adventists, are given special favorable treatment. Further, the preferential treatment given the Hebrew religion and the Seventh Day Adventists goes even farther in that there is an attempt to compel stricter compliance with the principles of those religions by their adherents. It is to be noted that the exclusionary benefits to members of the Hebrew religion and Seventh Day Adventists are bestowed only to those who "conscientiously observe."

Significant special consideration has been given to the Christian religion and, to a lesser degree to those who are "conscientious" followers of the Hebrew and Seventh Day Adventist religions. No consideration has been given to followers of religious faiths which honor days other than Saturday or Sunday. No consideration is given to those who are members of no organized religious faith. And finally, no consideration is given to those who are members of the faiths given special privileges by the statute, who have personal feelings of conscience concerning the sabbath which are in conflict with their accepted faiths.

This is not to suggest that the statute would be less offensive if it tried to make special provisions for each of the groups neglected. The First Amendment to the Constitution of the United States was surely not designed to permit the establishment of many state religions. It is sub-

mitted, however, that the statute here is a violation of the basic Constitution prohibition in the most offensive form, for it is not only a law respecting an establishment of religion but it is a law favoring certain religious groups over others, and even containing gradations of favoritism within those that are given privilege status.

Although the Ohio Supreme Court has held that an earlier version of the Ohio Sunday Closing laws was not a statute involving religion, *State v. Kidd*, 167 Ohio St. 521 (1958), its decision can be explained on no other basis when compared with *Cincinnati v. Correll*, 141 Ohio St. 535 (1943) and *Olds v. Klotz*, 131 Ohio St. 447 (1936), which held that legislative attempts to regulate hours of employment were not within the scope of the police power to regulate health and welfare.

The separation of church and state throughout the history of this nation has been looked upon as fundamental to the continuance of our free society. From the "wall" of separation pronounced by Jefferson in the Eighteenth Century, to the writings of William Lloyd Garrison in the Nineteenth Century:

> "* * * every attempt which is made to enforce the observance as a peculiar 'holy day' by pains and penalties whether civil or ecclesiastical is positive tyranny * * *"

the principle of separation has been proclaimed. The adherence to this principle has not withered with time for its reiteration by this Court in mid-Twentieth Century is no less firm than at any time in our history:

> "We renew our conviction that 'we have staked the very existence of our country on the faith that complete separation between the State and Religion is best for the State and best for Religion * * *.'"
>
> *McCollum vs. Board of Education*, 333 U. S. 203, 232 (1948).

B. Ohio Revised Code Section 3773.24 Violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of The United States.

By virtue of the statute in question, there is a deprivation of the use of property, without any constitutionally acceptable reason for said deprivation. Further said deprivation is imposed on certain groups and not on others, on an arbitrary and capricious basis.

The Ohio Statute, aside from its exemptions granted to certain religious groups, also grants exemptions to different types of businesses.

Myriads of examples can be cited to demonstrate (a) that there is a deprivation of property without due process since, health, safety and morals have no relationship to the statute's requirements, and (b) that the distinctions made by the statute are capricious and constitute a denial of equal protection of the law. A few examples of activities sanctioned and prohibited on Sundays by the Statute are set out below.

PERMISSIBLE	FORBIDDEN
To stage a boxing match.	To open a stationery & book shop.
To sell refreshments at a baseball game.	To sell refreshments at a department store.
To engage in 60 minutes of professional football.	To open a clothing store for any period of time.
To work as a circus barker.	To hold office hours in a law office.
To open a furniture store if one is an adherent to Orthodox Judaism and "conscientiously" observes Saturday as the Sabbath.	To open a furniture store if one is a Christian, or an adherent to Reform Judaism.
To sweep up manure at a County Fair	To sell musical instruments and give music lessons.

No constitutional legislative purpose or legitimate interest of the state can justify the taking of property rights and the unequal exemptions from the taking provided by this statute. The health and safety of the public surely does not demand that property rights be destroyed to produce rules of legal and illegal activity such as set forth above.

C. Ohio Revised Code Section 3773.24 Cannot Be Deemed Constitutional as a Statute Establishing a Common Day of Rest.

(1) *Common Day of Rest Statutes Are Unconstitutional.*

Assuming *arguendo* that Ohio Revised Code Section 3773.24 attempts merely to establish a common day of rest with no religious overtones, the statute in question fails woefully to meet the requirements of an enactment under the police power as properly stated by the Ohio Supreme Court:

> "Laws or ordinances passed by virtue of the police power which limit or abrogate constitutionally guaranteed rights must not be arbitrary, discriminatory, capricious or unreasonable and must bear a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public.
>
> "The Courts of this country have been extremely zealous in preventing the constitutional rights of citizens being frittered away by regulations passed by virtue of the police power." *Cincinnati v. Correll*, 141 O. S. 535 (1943).

It cannot be demonstrated that the establishment of a common and arbitrarily selected day of rest "*bears a real and substantial relation to the object sought to be obtained,*

namely the health, safety, morals or general welfare of the public."

Laws dealing with the number of hours of work per day or number of days of work per week are common and have met the test of constitutionality. The *Fair Labor Standards Act*, 52 Stat. 1060 as amended, 29 U. S. C. Sections 201-219 (1938) held constitutional in *U. S. v. Darby Lumber Co.*, 312 U. S. 100 (1941) is an example of this type of legislation. But there is an essential difference between this social legislation which regulates the maximum hours to be worked *without designating specific hours or days during which employment is illegal*, and the statute under consideration here, which proscribes employment *on a day certain*. While the former legislation is clearly related to a proper legislative purpose—to promote the health and welfare of the employees it is designed to protect, creating rest and leisure time for them by limiting the number of hours worked per week, the Sunday Closing laws have no such humanitarian purpose or effect. It cannot be urged as either necessary or desirable that all men regenerate their energies simultaneously by resting from their labors on the same day each week. Nor is there any other discernible valuable social objective in resting in unison sufficient to justify the denial of freedom of choice to an individual in a vital and private area of his life: the timing and utilization of his leisure.

To state the point more simply, while the state may properly require its citizens to rest for a designated period as a health and welfare measure, it cannot require uniform enjoyment of such leisure. For such enforcement is not only an invalid exercise of the police power of the state and hence a violation of the Fourteenth Amendment, but in addition, such legislative action constitutes an un-

justified invasion of the Right of Privacy protected by the Fourteenth Amendment as well. (*Wolf v. Colorado*, 338 U. S. 25 (1949), and *Frank v. Maryland*, 359 U. S. 360 (1954).)

Moreover, the statute in question is significantly defective in that it must, of necessity, be so riddled with exceptions and exemptions that it destroys even its own constitutionally defective reason for being. If it be argued that such statutes are valuable because they create a *common* rest day, it must at the same time be agreed that such statutes defeat their own purpose for existence. Because of the intense interdependence and complexity of modern economic life, it would be impossible to legislate all work to cease on any day. Exceptions must be established for many vast groups—e.g., military personnel, civilian police, transportation workers, utility workers, hospital and medical personnel, those in the communication industry, workers in certain areas of government, clergymen, etc. The list of necessary exceptions is a long one, and this long list does not normally end with these exceptions which are literally necessary. Experience with these statutes indicates that entertainment, athletic and various service industries are generally also considered exceptions to the rule that all shall observe a common day of rest.

Let us assume *arguendo* that a common day of rest is a valid objective under the police power. Legislation which overrides fundamental liberties must fail despite validity under the police power unless there is a compelling reason to override the fundamental liberties. Liberty of action and liberty of spirit are legitimate goals of man. A Sunday closing law restricts the freedom of action of an individual for it tells him that he must not work, or seek economic advancement, sell his wares, or purchase

needed food, clothing, or other goods on that day. Abstention from work on Sunday is a symbolic recognition of the resurrection of Christ. To those of the Jewish faith and some other faiths, abstention from work is a most fundamental expression of worship and abstention on the Christian Sabbath thus interferes with the liberty of spirit of those having non-Christian beliefs.

A compelling reason or "a clear and present danger" is a prerequisite to sustaining a valid exercise of the police power which is in conflict with the preservation of fundamental freedoms. An analogy can be made to Justice Holmes' famous example concerning infringement of the right of free speech. Justice Holmes said that although free speech is a fundamental right it was not so broad as to allow a person in a crowded theater to shout "fire" and thus endanger the safety of others in the theater when, in fact, there is no fire. As Justice Holmes said, there must be a clear and present danger to the community, however, before a fundamental right may be restricted.

The Polygamy Cases use the same yardstick. In those cases certain Mormon sects had a religious belief favoring polygamy. When this religious belief came in conflict with a state statute outlawing polygamy this Court held that although the Mormon religious belief is protected as a fundamental right it cannot be protected when the exercise of that belief constituted a danger to the health, welfare, safety and morals of the rest of the people of the state.

Applying these yardsticks to the Sunday closing statutes it is apparent that there is no clear and present danger insofar as the people of Ohio are concerned, nor is there a compelling reason sufficient to restrict the exercise of fundamental rights. California, Arizona, Oregon, Wisconsin, and Wyoming do not have Sunday closing laws and there is no evidence that citizens of those states are in danger of having their health, welfare or safety impaired

Lacking a compelling reason the Sunday closing laws should be held invalid as they conflict with fundamental rights and impair the individual's liberty of spirit and liberty of action.

Mr. Justice Stewart writing for the majority in *Shelton v. Tucker*, U. S. Supreme Court Docket No. 14, said: "* * * even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." If the purpose of Sunday closing statutes is to insure that the citizens get needed rest this purpose may be more narrowly achieved by enacting a one day in seven statute rather than a common day of rest statute. We submit that the latter stifles fundamental personal liberties, in violation of Constitutional safeguards for the individual.

In *Gomillion v. Lightfoot*, decided by this Court on November 14, 1960 the Court said: "When a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." Freedom of spirit and action and free exercise of religion are federally protected rights. Therefore, despite an interest of the state, such interest should not be insulated when the statute circumvents these federally protected rights.

(2) *The Statute Involved Is Not a Common Day Of Rest Statute.*

It is the position of Amicus Curiae that so-called Common Day of Rest statutes are unconstitutional. However, even if the Court were to decide otherwise, the statute in question in this case would not be saved from objections to its constitutionality, for *the statute is not a*

common day of rest enactment. The exceptions carved out of the statute, as noted hereinabove, are so numerous and varied—ranging from exceptions for County Fairs to exceptions, based not on the activity involved, but on the religious faith of the individual that a perversion of the language is required to label this a *common* day of rest statute. Where the exceptions dwarf the rule, the universality of the legislative application is itself destroyed by the statutory exemptions.

(3) *Sunday Cannot Constitutionally Be Selected As a Common Day of Rest.*

In *Bush v. Orleans Parish School Board,* F. Supp. (Nov. 30, 1960), motion for stay denied U. S. (1960), the Louisiana State Legislature, in an effort to prevent integration in New Orleans schools, enacted a so-called Interposition Act, and in support of the purpose of that Act various statutes relating to the operation of New Orleans schools were thereafter enacted. After striking down the Interposition Act as illegal defiance of constitutional authority, a three-judge District Court went on to strike down all of the school measures enacted by the Louisiana State Legislature as part of the same scheme to prevent integration in New Orleans schools. In so doing, the District Court stated:

> "As to these measures, then, we are admittedly in an area peculiarly reserved for exclusive state action. But, just as clearly, we know that the sole object of the legislation is to deprive colored citizens of a right conferred upon them by the Constitution of the United States. The question is whether the protective arm of the Constitution reaches into the 'inner sanctum' where the state conducts what it considers its strictly private business. The answer is eloquently stated in Gomillion vs. Lightfoot, decided by the Supreme Court Nov. 14, 1960. There, in holding an act of a

state Legislature redefining municipal boundaries so as to exclude Negro citizens clearly unconstitutional, the court stated:

> " 'When a state exercises power wholly within the domain of state interest, it is insulated from Federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. This principle has had many applications. It has long been recognized in cases which have prohibited a state from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an "unconstitutional condition." What the court has said in those cases is equally applicable here, viz., that "acts generally lawful may become unlawful when done to accomplish an unlawful end. United States vs. Reading Company, 226 U. S. 324, 357 and a constitutional power cannot be used by way of condition to attain an unconstitutional result." Western Union Telegraph Company vs. Foster, 247 U. S., 105, 114. * * *.' "

The long history of religious origins and motivations of Sunday Closing Laws so pervades the subject of any such legislation that it becomes constitutionally impossible for any legislature in a predominantly Christian State to validate such legislation by a subsequent legislative determination that it is within its "police powers" to designate Sunday as a common day of rest for its inhabitants. If a State wishes Sunday to be that common day, it is constitutionally proscribed from using its power to achieve this result. Achieving such a result must be left to members of the community, acting privately and without State action. One such private force is labor unions, with its absolute prohibition of Sunday labor in some cases, and requirement of premium pay for Sunday labor in other cases. Other such forces are the organized Christian community and other community pressures exerted in a private capacity.

CONCLUSION.

The legislative bodies of the state of Ohio, in Ohio Revised Code Section 3773.24, have enacted a statute which is essentially a religious piece of legislation containing within it special benefits for and discriminations against certain religious groups. In attempting to mask the religious nature of the act, the Ohio General Assembly has created a statute which deprives certain persons of their property without due process of law and fails to provide equal protection of the law to many.

The issues here are substantial for they raise questions related to provisions of the United States Constitution which are basic to a free society as we know it—the First and Fourteenth Amendments. This Court needs no prompting on the significance of problems raised by Sunday Closing Laws, for this Court has already consented to hear and has heard five other cases involving statutes of this nature. *Gallagher v. Crown Kosher Market*, October Term 1960, Docket No. 11; *McGowan v. Daryland*, October Term 1960, Docket No. 8; *Bargaintown, U. S. A., Inc. v. Whitman*, October Term 1960, Docket No. 891, and *Two Guys From Harrison-Allentown, Inc. v. McGinley*, October Term 1960, Docket No. 36.

Respectfully submitted,

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